

Supreme Court, U.S.
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FEB 11, 1988
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JOSEPH F. SPANIOL, JR.
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No. **87-6422**

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

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ROBERT LEE LEWIS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

=====

EDITOR'S NOTE

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ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit of Florida
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner

QUESTION PRESENTED

Did the police action of confronting the petitioner with evidence of his crime while he was in custody and after he had invoked his right to remain silent constitute the functional equivalent of interrogation in violation of petitioner's Fifth Amendment protections against compelled self-incrimination?

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STATE OF FLORIDA,

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PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
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Petitioner, ROBERT LEE LEWIS, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Fourth District, entered on July 8, 1987. Petitioner's timely filed motion for rehearing was denied on August 11, 1987. Petitioner timely sought discretionary review of the decision of the district court in the Supreme Court of Florida which declined to accept jurisdiction in an order dated December 14, 1987.

CITATION TO THE OPINION BELOW

The decision of the District Court of Appeal, Fourth District, in this cause appears as Lewis v. State, 509 So.2d 1236 (Fla. 4th DCA 1987), and is set out at pages 1 and 2 of the Appendix of this petition. The order of the district court denying rehearing is contained in the Appendix at page 3. The decision of the Florida Supreme Court denying discretionary review is not yet reported and is contained in the Appendix at page 4.

JURISDICTION

The District Court of Appeal, Fourth District, entered its opinion on July 8, 1987, denied rehearing on August 11, 1987, and the Supreme Court of Florida declined to accept jurisdiction to review the case on December 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States, specifically that portion of the Fifth Amendment that provides that no person "shall be compelled in any criminal case to be a witness against himself" as made applicable to the states through the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner, ROBERT LEE LEWIS, was convicted of attempted first degree murder, robbery with a firearm and shooting into an occupied building arising out of a robbery of Bobby Lee Walker, a Shell gas station attendant, on December 6, 1985. After petitioner was arrested and given his Miranda¹ warnings by Detective O'Connor, he invoked his right to remain silent but did not request the presence of an attorney. Immediately thereafter, Detective O'Connor instructed Officer Curcio to take petitioner to an evidence room where he was shown a video tape of the robbery and shooting of Mr. Walker. While viewing the video tape, the petitioner said to Officer Curcio: "Man, he took it like a man. I should have hit him a couple more times."

Petitioner timely appealed to the District Court of Appeal, Fourth District, contending reversible error in the failure to grant his motion to suppress incriminating statements while he was in custody. On appeal, the District Court of Appeal, Fourth District, held that confronting petitioner with incriminating evidence is not the "functional equivalent" of express questioning within the meaning of Rhode Island v. Innis, 446 U.S. 291 (1980), even though the Court also observed that "the police should have known that showing the appellant the evidence against him would be likely to elicit an incriminating response." (Appendix - 2). The court concluded that from the petitioner's perspective such police procedure did not impinge upon petitioner's will in a coercive manner because petitioner was no novice to the

criminal justice system, had a long and serious felony record, was familiar with police procedures and tactics and laughed while watching the video tape. Lewis v. State, supra (Appendix - 2).

Petitioner timely filed his motion for rehearing on July 23, 1987, which was denied on August 11, 1987 (Appendix - 3). Petitioner then timely sought discretionary review in the Supreme Court of Florida which declined to review petitioner's case on December 14, 1987, Justices Barkett and Kogan dissenting (Appendix - 4). Petitioner now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

The District Court of Appeal, Fourth District of Florida formulated a novel legal principle in petitioner's case that the police cannot interrogate a laughing suspect. In prior opinions under the rationale of Rhode Island v. Innis, 446 U.S. 291 (1980), federal appellate courts and state courts of last resort have recognized that the police practice of confronting an accused with evidence of his crime while he is in custody and after he has invoked his right to remain silent has only one possible objective - to elicit a statement from him. Combs v. Wingo, 465 F.2d 96,99 (6th Cir. 1972); United States v. Barnes, 432 F.2d 89 (9th Cir. 1970); People v. Ferro, 472 N.E.2d 13, (N.Y. 1984); Koza v. State, 718 P.2d 671 (Nev. 1986); Wainwright v. State, 504 A.2d 1096 (Del. 1986); State v. Quinn, 498 A.2d 676 (M.D. App. 1985). This Court should grant the writ to decide whether a police officer's communications about the evidence against a defendant is the "functional equivalent of interrogation" and thus a prohibited, coercive response under Rhode Island v. Innis to a recalcitrant arrestee's invocation of his Fifth Amendment right to remain silent.

In Innis, the Court made clear that interrogation under Miranda refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response. 446 U.S. at 301. Because "the latter portion of this definition focuses primarily upon the perceptions of the suspect, rather

¹

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

than the intent of the police" (id.), the question is not what was the subjective intent of the police but rather what words or actions, in light of their knowledge concerning the suspect, the police "should have known were reasonably likely to elicit an incriminating response."

In petitioner's case, the district court recognized that the "police should have known that showing the appellant the evidence against him would be likely to elicit an incriminating response."

Lewis v. State, at 1237. But such obvious knowledge on the part of the police to participate in the functional equivalent of interrogation was constitutionally legitimized in petitioner's case because petitioner had a prior criminal record, prior contact and knowledge of police techniques and because he laughed. Under the district court's opinion, the objective test of Rhode Island v. Innis, to determine whether a practice is interrogation may be avoided completely when police deal with hardened criminals or suspects who display an attitude of arrogance or show nervous or embarrassed laughter or other inappropriate emotional response. In effect, the court concludes that when a suspect ought to be savvy enough to see through a psychological ploy or coercive influence of a police tactic, that he has not been subjected to what everyone else knows is interrogation. It is clear that the District Court of Appeal, Fourth District of Florida has misconstrued this Court's clarification of the test of Rhode Island v. Innis as set forth in Arizona v. Mauro, ___ U.S. ___, 107 S.Ct. 1931 (1987).

This case presents the question whether the practice of detailing the evidence against the defendant who has invoked her right to remain silent goes beyond the necessities of arrest and booking; in Koza v. State, 718 P.2d 671 (Nev. 1986), such a police technique was called "interrogation" within the meaning of Rhode Island v. Innis. Delaware also regards police initiated conversation to describe the state's evidence against the accused

during the booking process as a gratuitous and totally unnecessary tactic which is reasonably calculated to elicit a reaction and an incriminating statement from the defendant, Wainwright v. State, 504 A.2d 1096 (Del. 1986).

Maryland courts also regard police officer's communications about the evidence against the defendant as interrogation, an attempt to manipulate the mental process of the arrestee to psych him into changing his mind about invoking his Fifth Amendment right to remain silent or to request the presence of counsel during interrogation. State v. Quinn, 498 A.2d 676 (1985). Placing stolen furs from the murder victim's residence in front of the jail cell of a defendant who had invoked his right to silence was found to constitute the functional equivalent of interrogation even though no words were spoken by the police officer in People v. Ferro, 472 N.E.2d 13 (N.Y. 1984).

A significant constitutional question on the extent of Miranda's safeguards is presented in this case. Is confronting the defendant with evidence against him normally attendant to arrest and custody or does it taunt him to deny, explain or confess to the significance of the evidence? This important question of constitutional law should be decided by this Court before confusion and controversy over this Court's decision in Arizona v. Mauro grows.

There is some authority from federal appellate courts that the interrogator may show the accused the evidence against him and then ask him whether he has reconsidered his decision to remain silent. United States v. Pheaster, 544 F.2d 353, 366-68 (9th Cir. 1976); United States v. Hodge, 487 F.2d 945, 946-47 (5th Cir. 1973). But, after the definition of "interrogation" in Innis, the officers should have known that showing petitioner the video of the crime being committed would likely elicit an incriminating response. Petitioner's incriminating statement was the intended and not the unforeseeable result of the officer's action of confronting petitioner with the video.

The decisions of the federal courts of appeal are in conflict on this question of law. Other state courts of last resort have decided this legal question contrary to the manner decided by the District Court of Appeal, Fourth District of Florida and some of the federal circuit courts. The law on this constitutional question of whether it constitutes impermissible interrogation to immediately confront the accused with evidence against him after he has invoked his right to remain silent is one which should be settled by the Court to maintain uniform application of an accused's rights under the Fifth Amendment. The writ should be granted to determine whether petitioner's incriminating statement was secured in violation of his Fifth Amendment rights or whether this police practice is one which may be constitutionally employed.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

Margaret Good
MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner

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ROBERT LEE LEWIS
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ON PETITION FOR WRIT OF CERTIORARI
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A P P E N D I X

RICHARD L. JORDANBY
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of 60 days or entry of a new injunction, whichever occurs first.

LETTS, DELL and STONE, JJ., concur.



Robert Lee LEWIS, Appellant,

v.

STATE of Florida, Appellee.

No. 4-86-0913.

District Court of Appeal of Florida,
Fourth District.

July 8, 1987.

Rehearing Denied Aug. 11, 1987.

Defendant was convicted for attempted murder in the first degree, robbery with use of a firearm, and shooting into an occupied building, in the Circuit Court, Broward County, Mark A. Speiser, J. Defendant appealed. The District Court of Appeal, Rivkind, Leonard, Associate Judge, held that confronting defendant, who asserted his privilege against self-incrimination and had not waived that privilege, with videotape of robbery, was not "functional equivalent" of express questioning, requiring suppression of spontaneous and voluntary assertion made by defendant while being shown videotape of robbery.

Affirmed.

See also Fla.App., 508 So.2d 358.

1. Criminal Law — 412.1(4)

Confronting defendant, who asserted his privilege against self-incrimination, and had not waived that privilege, with videotape of robbery, was not "functional equivalent" of express questioning, requiring suppression of spontaneous and voluntary assertion made by defendant while being shown videotape of robbery.

2. Criminal Law — 412.1(4)

"Interrogation" within purview of *Miranda* is not restricted to express questioning.

See publication Words and Phrases for other judicial constructions and definitions.

Richard L. Jorandby, Public Defender, and Margaret Good, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Jr., Atty. Gen., Tallahassee, and Michael W. Baker, Asst. Atty. Gen., West Palm Beach, for appellee.

RIVKIND, LEONARD, Associate Judge.

Appellant Robert Lee Lewis, appeals his conviction and sentence for attempted murder in the first degree, robbery with the use of a firearm, and shooting into an occupied building. Appellant contends that the trial court erred in failing to grant his motion to suppress incriminating statements made by him while in custody.

After appellant had been given *Miranda* warnings, he chose to remain silent but did not seek the assistance of counsel. He was not subject to express questioning. However, he was shown a video tape of the robbery. While being shown the tape, appellant made the statements: "Man, he took it like a man. I should have hit him a couple more times."

[1] Appellant argues that being confronted with the evidence is the "functional equivalent" of express questioning. We disagree. The conviction and sentence are affirmed.

A statement made by a person in response to custodial interrogation after he has exercised his right to remain silent is inadmissible unless he waives his privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Here the appellant asserted that privilege. There was no waiver. Consequently, the admission is admissible only if it was not given in response to police interrogation.

Cite as 509 So.2d 1237 (Fla.App. 4 Dist. 1987)

[2] "Interrogation" within the purview of *Miranda* is not restricted to express questioning. The United States Supreme Court expanded the terms to include any conduct that is its functional equivalent.

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 1690, 64 L.Ed.2d 297, 308 (1980) (footnotes omitted).

Most recently the United States Supreme Court has held that the suspect's perspective is extremely relevant in determining whether a certain police procedure constituted interrogation. *Arizona v. Mauro*, — U.S. —, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987). The court used a case by case totality of the circumstances approach to determine whether the subject perceived that he was being coerced by a specific police procedure.

In the case at bar, it is unlikely that the appellant was compelled to incriminate himself by viewing a video of the robbery. He was no novice to the criminal justice system. He had a long and serious felony arrest record. He was familiar with police procedure and techniques. In addition, the testimony adduced at trial disclosed that he engaged in levity while watching the tape. His demeanor belies his contention that he was coerced by an "interrogation environment."

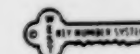
It may be that the police should have known that showing the appellant the evidence against him would be likely to elicit

1. The appellant's second point on appeal, that the trial court exceeded the sentencing guide-

an incriminating response. However, the circumstances of this case support the conclusion that from the appellant's perspective such police procedure did not impinge upon his will in a coercive manner. His perspective detracts from the coerciveness of the interrogation environment. Appellant's response, therefore, was not in answer to interrogation but was a spontaneous and voluntary assertion. No constitutional error was committed by admission of his comments into evidence.

Affirmed.¹

HERSEY, C.J., and GUNTHER, J., concur.



Michael JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

No. 85-2725.

District Court of Appeal of Florida,
Fourth District.

July 8, 1987.

Defendant was convicted in the Circuit Court, Broward County, Mark Speiser, J., of robbery and kidnapping. Defendant appealed. The District Court of Appeal, Stone, J., held that: (1) defendant's confinement of clerk of convenience store was sufficient to support conviction for kidnapping; (2) fact that robbery victim suffered emotional trauma not significantly different from that usually associated with components of crime was not clear and convincing reason to depart from sentencing guidelines; and (3) victim's age was not a valid consideration in departing from sentencing guidelines for robbery.

lines, is moot. On remand, the sentence was amended to conform to the guidelines.

ROBERT LEE LEWIS

Appellant,

v.

CASE NO. 4-86-0913

STATE OF FLORIDA

Appellee.

AUGUST 11, 1987

BY ORDER OF THE COURT:

ORDERED that the July 23, 1987 Motion filed by Appellant for
Rehearing is denied.

I hereby certify the foregoing is a
true copy of the original court order.

CLERK

cc: Margaret Good, Ass't. Public Defender
Marilyn Eisler, Ass't. Attorney General

CMS

Supreme Court of Florida

MONDAY, DECEMBER 14, 1987

ROBERT LEE LEWIS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 71,125

District Court of Appeal,
Fourth District No. 4-86-0913

This cause having heretofore been submitted to the Court on jurisdictional
briefs and portions of the record deemed necessary to reflect jurisdiction under
Article V, Section 3(b), Florida Constitution (1980), and the Court having determined
that it should decline to accept jurisdiction, it is ordered that the Petition for
Review is denied.

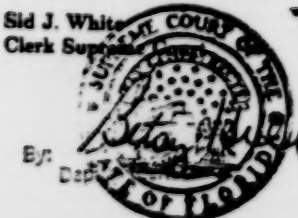
No Motion for Rehearing will be entertained by the Court. See Fla. R.
App. P. 9.330(d).

MCDONALD, C.J., OVERTON, EHRLICH, SHAW and GRIMES, JJ., concur
BARKETT and KOGAN, JJ., dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court



By:

H
cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Mark A. Speiser, Judge

Margaret Good, Esquire
Marilyn Eisler, Esquire
John W. Tiedemann, Esquire

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MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, ROBERT LEE LEWIS, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto an affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit of Florida
9th Floor Governmental Center
301 North Olive Avenue
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(305) 820-2150

BY Margaret Good
Counsel for Petitioner

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AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, ROBERT LEE LEWIS, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [] No [x]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. About, 400. A Month Year(1970)

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes []

No [x]

b. Rent payments, interest or dividends? Yes [] No [x]

c. Pensions, annuities or life insurance payments? Yes []
No [•]

d. Gifts or inheritance? Yes [] No [•]

e. Any other sources? Yes [] No [•]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in a checking or saving account? Yes [] No [•] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [] No [•]

If the answer is "yes" describe the property and state its approximate value. _____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. _____

1 nobody

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

Robert Lewis

Signature of Petitioner

STATE OF FLORIDA)

COUNTY OF _____)

ROBERT LEE LEWIS, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Robert Lewis
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 21st day of January, 1988.

P. E. [Signature]
NOTARY PUBLIC
Notary Public, State of Florida
My Commission Expires Feb. 6, 1989
Dwight Lee Lee, Notary Public

My Commission Expires: